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CONTRACTS TO MAKE WILLS

WILLIAM M. JAMES

In recent years there has been an increasing amount of litigation arising out of agreements to make wills. As a consequence the lawyer of today, who is handling probate work, must acquaint himself with these agreements, their validity and enforceability.

It is not intended that this article shall constitute a brief on this subject but rather it shall be the purpose of the writer to discuss several of the more important legal aspects of this type of agreement.

EXAMPLES OF HOW THESE CONTRACTS ARISE

In order to get a clearer understanding of the various phases of this question, it would seem advisable at the outset to examine the circumstances which most frequently give rise to these agreements. Among the more familiar examples is the case where a certain person has given his property to another, the donee to have the use of the principal and income arising therefrom during his life and to make a will devising all of the property which he may have at his death back to the original donor. For instance suppose a husband dies leaving a will in which he bequeaths his property to his wife and children. One of the children then desiring that his mother shall have the use of the income and principal of his father's estate, which is devised to him, gives the property so received by him from his father to his mother, and in consideration of this gift to her, the mother agrees to make a will leaving all the property she may own at the time of her death, to the son, who made the transfer to her.

A second example is where two persons each agree to make a will in favor of the other with the understanding that the survivor shall take all.

A third case is where a promisor agrees to devise or bequeath his estate or a stipulated portion of it to a person in consideration of such person rendering services to the promisor for a certain stipulated time or for the remainder of the promisor's life.

A fourth example is where one transfers his property to another, the transferee agreeing to support the donor as long as the donor shall live, and to leave a will devising the property transferred back to the donor in the event the donor survives the donee.

Then again an agreement of this type may also arise out of a "ante-nuptial agreement" whereby a man agrees with a woman that if she will marry him, he will devise and bequeath to her a stipulated sum in excess of the amount which she would be entitled to receive as his widow in the event she survives him.

Post-nuptial agreements may also give rise to a contract to make a will. For instance, a husband in consideration of his wife releasing her right of dower in and to his real estate may agree with her that he will devise and bequeath to her certain stipulated property in excess of what she would be entitled to receive were she to survive him. The foregoing examples are a few of the more common ones which give rise to an agreement to make wills. It is, of course, conceivable that these agreements could arise in many other ways.

PRE-REQUISITES TO VALIDITY

When the first effort was made to enforce agreements of this type it was contended that they were contrary to public policy and therefore void. It has, however, been so universally held that these contracts are not contrary to public policy

that it would seem unnecessary to refer to any decisions on this point. In order for an agreement of this type to be valid, there are, however, certain requisites which must be complied with.

In the first place the parties to the agreement must be possessed of the capacity to contract. This principal was discussed in *Howe vs. Watson et al* 179 Mass., p. 30. In this case the person who had agreed to make a will leaving her property to the plaintiff was at the time of making the agreement eighty-five years of age and in poor health. The testimony showed that at the time she wrote the letter which constituted the agreement, she was dressed and sitting up and appeared to be in her right mind, which seemed as clear as it had ever been. There was some conflicting testimony by the attending physician that the mental faculties of the deceased were impaired to a great extent. This testimony was corroborated in some degree by the nurse of the deceased. Nevertheless, it was held that the evidence taken as a whole was sufficient to support a finding by the Master that the deceased was of sound mind at the time she made the agreement, and, therefore, had the capacity to contract. This case illustrates the principal that the parties to an agreement to make a will like the parties to any other contract must have the capacity to contract. Such a contract in order to be inforcible must also be fair and equitable. This rule was adhered to by the court in *Hanly v. Hanly*, 105 N. Y. App. Div. 335 in which case the court said that before an agreement of this type will be enforced it must be fair and equitable in its terms. This precise language was also used by the Court of Appeals of N. Y. in *Hamlin vs. Stevens*, 69 N. E. 118, and several other well-considered cases.

In common with other contracts an agreement to make a will in order to be binding must also be mutually accepted by the parties thereto. This principal is well illustrated in *Rose vs. Oliver, et al*, 32 Oregon 337. This was a suit filed by the plaintiff, to require the heirs of the de-

ceased to specifically perform a certain contract alleged to have been entered into between the plaintiff and the deceased, whereby the deceased agreed to make a will devising and bequeathing all his property at the date of his death to the plaintiff, to the exclusion of the other heirs at law. The testimony in the case showed that the proposed devisee may have voluntarily substantially complied with the terms of the alleged agreement, but that he was not in fact under any obligation or understanding to meet the offer and proposal or the alleged promise of the deceased. The court in its opinion pointed out that "a proposition that certain property shall be devised to another in consideration of certain services to be performed for the devisor during his life is not binding, and specific performance cannot be enforced where there is no acknowledgment of its terms showing a mutual agreement thereto although the proposed devisee may have voluntarily substantially complied with the terms thereof." In other words, whatever is to be done by the promisee must be pursuant to the terms of the agreement, with knowledge by both parties that the promisee is electing to be bound by the agreement and is endeavoring to fulfill his part of it.

A contract of this type must, of course, be supported by a valid consideration. This consideration, however, may be in a variety of forms. For example, in the case of *Evans vs. Moore*, 247 Ill. P. 60, the court held that an agreement by a land owner to devise his property to his nephew if the latter would leave his parents and relatives, renounce allegiance to his country and come to the United States to live and become a citizen thereof was founded upon a valuable consideration, and would be enforced if the contract had been complied with by the promisee. In the case of *Oswald vs. Nehls, et al*, 233 Ill. 438, the consideration was in the form of services to be rendered by the proposed devisee and was held sufficient to support an agreement to make a will. These are only a few of the many types of consideration which will support these agree-

ments. It is also necessary that a contract to make a will be certain and definite in its terms. This is particularly true where it is sought to enforce a contract to make a will where such contract is contrary to the statute of frauds. In *Smith vs. Smith*, 5 Bush, Ky. 625, the plaintiff sought to enforce a written contract which contained the following provision: "It being the express agreement and understanding between the parties hereto that on a final distribution of his estate, the said Peter Smith intends to make the aforesaid children, who represent their father, the said Noah Smith, equal in all things with his son." It was contended by the defendants that these words imposed no obligation on the deceased and constituted a mere expression of his feelings and purposes at the time he signed the agreement and were merely explanatory of the motives which induced him to enter into the agreement. The court held that the foregoing portion of the contract, together with other words contained in the contract were sufficiently definite to constitute an obligation on the part of the promisor to make the children of Noah Smith equal with his son L. C. Smith in the distribution of the promisor's estate. In *Brandes vs. Brandes*, et al, 129 Ia., p. 351, two of the cross petitioners alleged that the deceased, who was their grandfather, because of certain matters, had agreed to make provision for them in his will and that certain land devised to them by the deceased was in pursuance of such agreement and therefore that the widow's dower should be set apart for her from other property owned by the deceased at his death. The evidence adduced in support of these allegations showed that the testator had merely remarked that he would remember them but did not indicate how nor the particular consideration for which this should be done. The court in refusing to enforce the claim of the cross-petitioners pointed out that the alleged contract between them and the deceased was entirely too indefinite to entitle them to the relief prayed for. On the other hand in the same case a second agreement by the deceased to make a

will was alleged. It was contended that in this agreement the deceased and his wife, then residing in their home on Lots 10 and 11, proposed to the promisee that if she would move there with her family and take care of them in their old age, she should have said lots 10 and 11 and also lot 12 after their death; that she accepted the proposition and fully performed her part of the agreement. The agreement as alleged was substantially proved and the court held that it was sufficiently definite and certain in its terms to justify the court in enforcing it. This case is particularly interesting because of the fact that two different agreements are sought to be enforced, one of which is held unenforceable because it is not sufficiently certain and definite in its terms, and the other of which was enforced because it was sufficiently certain and definite in its terms. But not only must there be a certainty as to the property to be devised but the contract must also be certain as to the promisee. In the case of *Howe vs. Wilson*, et al, 179 Mass., p. 30, hereinbefore referred to, the contract of the decedant was in the form of a letter to her "sister Ellen" in which she offers to leave her property to the latter on certain conditions. The Court held that the words "sister Ellen" constitute a sufficient description of the promisee to constitute a valid contract, it appearing from the evidence that the deceased had only one sister named "Ellen." Also in connection with the degree of certainty required with respect to the property to be devised or bequeathed the court held in this same case that a contract to leave all the property that one party thereto may own at her death to the other party contains a sufficient description of the property.

It must further appear that the contract is free from fraud, undue influence and is not unconscionable. This principal was recognized in *Jenkins vs. Stetson*, 9 Allen Mass. 128.

Furthermore, it would seem that if the contract is in parol, a higher degree of proof is required. As was said in *Hamlin vs. Stevens*, 177 N. Y. 39, "Contracts to

make wills should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses. Unless such contracts are established clearly by satisfactory proofs, and are equitable, specific performance should not be decreed." The application of the statute of frauds to contracts of this character will be discussed later.

PERFORMANCE

Having now determined that contracts of this type will be enforced and also having briefly discussed several of the requisites of such contracts, let us see what constitutes a performance on the part of the promisor. In other words, if the promisor were to devise property of less value or were to devise a smaller estate or were to devise property and place a condition upon the devise when the agreement was for an absolute and unconditional bequest, would the contract then be sufficiently performed? These points have been discussed in a number of cases. In *Phalen vs. United States Trust Co.*, 186 N. Y. 178, it was held that a devise of property of less value than originally agreed upon did not constitute a sufficient performance. Again in *Parrott, et al, vs. Gaves' Ex'x*, 32 S. 605, the court pointed out that a devise of a smaller estate than agreed upon was not a sufficient performance and in *Crofoot vs. Layton, et al*, 68 Conn., p. 91, the Court very ably pointed out that a devise or bequest upon condition would not amount to a sufficient performance of an agreement where the agreement called for an absolute and unconditional bequest or devise.

WHEN BREACH OCCURS

As a general proposition it can safely be said that a breach of a contract of this type does not occur before the death of the promisor. Nor can there be a breach under certain circumstances. For example, it was held in 9 C. B. 1 by the Court of Common Pleas that where performance becomes impossible as by the death of the promisor during the life of the testator

the agreement becomes unenforceable. Performance may also be excused as where there is an abandonment by mutual consent as was the case in 78 Ill. 127 provided, however, that the abandonment by the promisor has not been condoned by the testator as was the case in *Burns vs. Smith, et al*, 21 Montana 251. In connection with the breach of a contract of this type the question frequently arises, what is the effect of a conveyance before death of a third person? A distinction is made where the agreement is to make a particular disposition of property and where the agreement merely covers the property which the promisor may leave by will. In *Evans vs. Moore, et al*, 247 Ill. P. 60, the Court pointed out that where a land owner agreed to devise his property to his nephew and the agreement was based upon a valid consideration and there was performance of the conditions by the nephew, he would be entitled to have the agreement carried out as against a voluntary grantee or devisee of the promisor, there being no question of the rights of bona fide purchasers involved. On the other hand in *Austin vs. Davis, et al*, 128 Ind. 472, where the agreement was to leave to the promisee whatever property the promisor may leave by will, it was held that the promisor retained all right of disposition thereof during his life and a voluntary gift of it to his wife not made with intent to defraud the promisee passes title thereto free from all charges arising out of his contract with the promisee.

A CAUSE OF ACTION ACCRUES

While the breach of an agreement to make a will does not ordinarily occur before the death of the promisor, it is possible for such an agreement to be repudiated by the promisor in his lifetime, in which event a cause of action accrues for relief by way of rescission or recovery of damages. He cannot, however, bring an action to specifically enforce the agreement until the death of the promisor. In *Chantland vs. Sherman* 148 Iowa 352 these precise principles were discussed, and the court said "an agreement to make

a will may not be specifically enforced until the death of the party agreeing to execute the will, but upon repudiation of such agreement by denying its existence, or by disposing of the property to be willed, a cause of action may accrue for the enforcement of the agreement through an analogous relief, rescission, or the recovery of damages. Otherwise performance might be defeated by rendering this impossible by the disposition of the property or through inability to prove the contract after the death of the promisor." In *Carmichael vs. Carmichael* 72 Mich. 76, a conveyance to a third person was set aside and a decree directed to be entered such as would prevent the party promising to make the will from violating the agreement. In *Duval vs. Duval* 54 N. J. Equity 581, a wife, who, on ample consideration, had promised to execute a will of certain property to her husband, repudiated the agreement and in a suit to protect the husband's rights the vice chancellor said, "While it is true that a promise to make a certain will is not broken until the death of the promisor and it is true that actions in which such promises have been enforced have been in cases occurring after the death of the promisor, yet I do not see why the court cannot, upon the principle of *quia timet*, fix upon the property a liability to answer the promise, in any case where the promisor has, during life, repudiated its terms, and attempted to make other disposition of the property." Also in *Vanduyne vs. Breeland*, 12 N. J. Equity, 142, the chancellor recognized the right of the promisee to protection upon the principle of *quia timet*.

METHODS OF ENFORCEMENT

Where there has been a breach of an agreement to make a will the question immediately arises, how shall the promisee seek to enforce the agreement? Several methods may be resorted to, depending on the nature of the property to be willed, the terms of the contract and whether or not it was in parol only. Where the agreement was to devise real

estate the most common method is by filing a bill in equity whereby the promisee seeks to impress the real estate with a trust and prays specific performance of the agreement. That equity has the power to decree specific performance of such an agreement can hardly be questioned in view of the numerous decisions throughout the United States holding that such a right exists in a court of chancery. As was pointed out in *Edwards vs. Brown et al* 308 Ill. P. 350, "Contracts to devise or convey real estate will be enforced in courts of equity by specific performance on the ground that the law will not do perfect and complete justice." Agreements to make wills have in proper cases been held enforceable in actions at law as well as in equity. For example in the case of *Frost vs. Tarr* 53 Ind. 390, the court held that an action at law for damages will lie for the violation of an agreement to make a will against the personal representative of the promisor, and in such case the damages may be measured by the value of the portion promised and the plaintiff will not be limited to the value of the services rendered by him as the consideration for the agreement. Also it has been held that where the agreement on the part of the promisee is to render services to the promisor, an action can be maintained on the common counts to recover the value of the service rendered. This method of enforcement was permitted in *Ginders vs. Ginders* 21 Ill. App. 522. In this case the court used the following language, "If the services of the promisee were rendered under an agreement with the deceased, that she would remain with and work for him during his lifetime, and that he would provide her a home and support upon his death and he did not do so, then the promisee may recover of his administrator as upon a *Quantum meruit*." It has also been held that such an agreement may be enforced by filing a claim against the decedents' estate. This method of enforcing the contract was used in *Mallory's estate* 35 N. Y. Supp. 155. In this case it was held that where the claimant furnished board to deceased under an agreement that he should receive

therefor whatever she had left at her death, the full amount therefor should be allowed, without regard to the value of the services. It has also been held that where a party to an agreement to make a will, void because of the statute of frauds, fails to perform his contract, the other party may recover back the amount paid in under the contract though the contract be a nullity and no action can be maintained upon it. This rule was applied in the case of *Smith vs. Smith* 28 N. J. Law P. 208. There a son of the promisor occupied the farm, which was owned by his father, as tenant from year to year. The son erected buildings upon the land with the consent and approbation of the father and upon the parol promise of the latter that he should have the farm, either by deed or devise, on the death of the father. This contract was held to be void because of the statute of frauds. But the court held that the son was entitled to recover from the estate of his father the value of the improvements placed upon the land.

EVIDENCE ADMISSABLE

Whenever it is sought to enforce an agreement to make a will the question necessarily arises can the plaintiff testify in his or her own behalf as to transactions or conversations with the deceased before his death. Naturally the capacity of the plaintiff to testify must necessarily depend largely upon the statutes in the different jurisdictions. A good illustration of this is found in *Showers vs. Warwick* 152 Ill. 356 Illinois, where the Supreme Court in construing the Evidence Act in Illinois held that the complainant in a suit against the heirs and devisees to enforce the specific performance of a verbal agreement to convey land is not nor is her husband a competent witness but in *Oswald vs. Nehls et al* 233 Ill. 438 the court held that the complainant could testify in her own behalf as to performance of the contract in so far as it effects the land which the children hold as voluntary grantees even though as to the land they hold as heirs she is not competent to testify. Regardless, however, of what testimony may

be admitted by the court, the same will be carefully scrutinized. As was stated in *Garren vs. Shook* 306 Ill. 154, "Courts of equity look with jealousy upon evidence offered in support of a contract to make a disposition of the property of a deceased person different from that provided by law and will weigh such evidence in the most scrupulous manner." The court further stated that "the proof which will justify a court of equity in decreeing the specific performance of a contract for a conveyance, the existence of which depends upon parol testimony must be clear and conclusive and there must be no reasonable doubt that the contract was made and that all its terms have been clearly proven."

APPLICATION OF STATUTE OF FRAUDS

The defense most frequently asserted by the defendants to actions brought to enforce agreements to make wills is the Statute of Frauds. There are three sections of the Statute of Frauds which the defendants have at one time or another sought to apply to these cases. The one most commonly interposed is that portion of the statute which provides in substance that "no action shall be brought to charge any person upon any contract for the sale of lands unless the contract be in writing." There can be no doubt that parol contracts to devise real estate fall within this portion of the statute. However, an exception has been made to this rule in many jurisdictions. For example in the case of *Mayo vs. Mayo* 302 Ill. P. 584 the court said, "The statute of frauds is designed to prevent fraud and it cannot be invoked to prevent the enforcement of a promise to convey land in return for services rendered where failure to enforce the contract will amount to a fraud upon the promisee." In *Horton vs. Stegmyer* 175 Federal 756, the court stated the exception even more broadly. The court said, "It is that part performance of such an agreement by delivery of possession of the property to the proposed devisee or by other similar acts which are unavoidably referable to the contract, which will take

it out of the statute, as they will other parol contracts to sell land." The court further said, "And there are cases in which long and patient service in reliance upon such a contract have been held to constitute such a part performance as would render inforceable the agreement," citing *Stone vs. Todd* 49 N. J. Law 274. However, in this connection the court further called attention to the fact that "The part performance which will withdraw such a contract from the ban of the statute must consist of an act or of acts which it clearly appears that the performing parties would not have done in the absence of the agreement or without a direct view to its performance." It has been further urged that the section of the statute which requires that "a contract not to be performed within a year from the making thereof" must be in writing applies to agreements to make wills. This contention has been held untenable, however, upon the theory that the contract may become capable of being performed by the parties within a year. In the case entitled *Story et al vs. Story et al* 61 S. W. 279 the court overruled the contention that this section of the statutes of frauds applied and stated "Where a contract depends upon an event that may happen within a year, it is not within the statute of frauds, although the parties may in fact contemplate that the contract will probably extend over a considerable length of time." The next section of the Statute of Frauds which it has been claimed applies to contracts to make wills is that portion of the statute which provides that "contracts to sell personal property in excess of a certain value shall not be enforceable unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." Where the agreement is to bequeath personal property in excess of the amount provided for in the statute and the agreement is not in writing it may fall within this section unless there has been such part performance as to take it out of the statute. If, however, we are to disregard this section of the Statute of Frauds and hold that it has no

application to an agreement to make a will, then it may become necessary to determine what is the effect of the section of the statute relating to the sale of real estate where the agreement is not only to devise real estate but to bequeath personal property. It has been held that where the contract is to devise real estate and bequeath personal property, it is wholly within this section of the statute if it is indivisible. At least it can safely be said that a parol contract to devise and bequeath real and personal property is void as to the real estate in the absence of partial performance or some other act taking the contract out of the statute of frauds.

STATUTE OF LIMITATIONS

The question has arisen in a number of cases as to when the statute of limitations commences to run. This point was passed upon by the court of appeals of Kentucky in *Story vs. Story* 61 S. W. 279. In this case the court held that a cause of action did not accrue upon a contract to make provision for another by will until the death of the promisor and the statute of limitations does not begin to run until that time. Where, however, a suit is based upon a quantum meruit to recover for the value of the service rendered and the Statute of Limitations is pleaded in defense it has been held that the plaintiff can only recover for his services for the time allowed for bringing suit next before presenting his claim, and in Illinois it was held that in computing the time, there must be deducted the time that elapsed between the death of the promisor and the day fixed by the administrators of his estate for the adjustment of claims against the estate. This rule was followed by the Illinois Supreme Court in *Freeman vs. Freeman* 65 Ill. 106. The Statute of Limitations in Illinois being five years at the time this action was brought.

Also where there has been an unequivocal repudiation of the contract in the lifetime of the promisor it has been stated that the Statute of Limitations will commence to run from the date of such repudiation.

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